LEMBAGA KUMPULAN WANG SIMPANAN PEKERJA A

v.

AZIMUDDIN AB GHANI & ORS

HIGH COURT MALAYA, KUALA LUMPUR B
LEE SWEE SENG JC
[CIVIL SUIT NO: S-21-2-2006]
10 MARCH 2011

COMPANY LAW: *Directors - Personal liability - Whether directors of company jointly and severally liable for EPF contributions due and payable - Company under scheme of rearrangement under s. 176(1) of Companies Act 1965 - Whether s. 46 of Employees Provident Fund Act 1991 unconstitutional* C

PROVIDENT FUND: *Arrears of contribution - Recovery of arrears of EPF contributions - Whether directors of company jointly and severally liable for EPF contributions due and payable - Company under scheme of rearrangement under s. 176(1) of Companies Act 1965 - Whether EPF officer concerned duly authorised to certify amount outstanding and to commence action - Employees Provident Fund Act 1991, ss. 46 & 64* D E

PROVIDENT FUND: *Liability of employer - Directors of company - Whether directors of company jointly and severally liable for EPF contributions due and payable - Company under scheme of rearrangement under s. 176(1) of Companies Act 1965 - Whether s. 46 of Employees Provident Fund Act 1991 unconstitutional* F

The defendants were directors of George Town Chemist Sdn Bhd ('the company') during the relevant period. The company went into financial problems and on 9 March 2005, it obtained a G restraining order under s. 176(10) of the Companies Act 1965 ('Companies Act') to restrain legal action against it for a temporary period pending the approval of a scheme of rearrangement under s. 176(1) of the Companies Act. The company had failed to make Employees Provident Fund ('EPF') contributions to the tune of H RM270,127 for the period from August 2004 to March 2005. The plaintiff thus claimed under an O. 14 Rules of the High Court 1980 (RHC) application for judgment to be entered against the defendants for the due and owing EPF contributions. The defendants raised the following purported triable issues: (i) that the I restraining order restrained the plaintiff from proceeding against the

directors of the company; (ii) that the EPF officer concerned was not duly authorised to certify the amount outstanding and to commence this action; and (iii) that Parliament has no authority to provide in effect through s. 46 of the Employees Provident Fund Act 1991 ("EPF Act") a lifting of the corporate veil and making the directors personally liable for the debts of the company.

Held (allowing plaintiff's claim with costs):

(1) Nowhere in the restraining order is the word 'directors' referred to. An action against the directors of the company cannot in any way be interfering with the restructuring of the company and more so when the restraining order made no reference to proceeding against the directors of the company. (paras 12 & 13)

(2) One Nailatul Himam had affirmed an affidavit stating that she was a senior legal officer of the plaintiff and was duly authorised to affirm the affidavit on behalf of the plaintiff. She had also exhibited a copy of the 'Instrument of Delegation of Powers'. In the absence of evidence to the contrary, a mere assertion that the said Nailatul had not been duly authorised to affirm the said affidavit and to sign the certificate referred to in s. 64 of the EPF Act was not sufficient to displace the authority of the said deponent *(Tang Kwor Ham @ Tang Kwor Harn & Ors v. Lembaga Kumpulan Wang Simpanan Pekerja*; refd). (paras 16 & 17)

(3) There was no merits in the argument that s. 46 of the EPF Act was unconstitutional. (para 30)

Obiter:

(1) It behoves directors of companies to ensure that at board meetings, they obtain written confirmation from the executive director and have it duly minuted that all statutory payments have been made. Failure to do so may expose all the directors, jointly and severally liable, irrespective of their involvement and interest in the company, to the full brunt of the law. (para 37)

Case(s) referred to:

Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(refd)***

Cempaka Finance Bhd v. Ho Lai Ying & Anor [2006] 3 CLJ 544 FC ***(refd)***

Lembaga Kumpulan Wang Simpanan Pekerja v. Shaharudin Omar & Ors [2008] 8 CLJ 684 HC ***(refd)***

Ng Hee Thoong & Anor v. Public Bank Berhad [1995] 1 CLJ 609 CA ***(refd)***

Ong Kim Chuan & Anor v. Lembaga Kumpulan Wang Simpanan Pekerja [2009] 6 CLJ 586 CA ***(refd)***

Puah Bee Hong & Bee Hong (F) & Anor v. Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor [1994] 2 CLJ 705 SC ***(refd)***

Tang Kwor Ham & Ors v. Lembaga Kumpulan Wang Simpanan Pekerja [2005] 8 CLJ 676 HC ***(refd)***

Legislation referred to:

Companies Act 1965, s. 176(1), (10F)

Customs Act 1967, s. 22C

Employees' Provident Fund Act 1991, ss. 14(3), 45(3), 46(1), (2), 49, 64, 65(1), (2)

Employees Social Security Act 1969, s. 108A

Rules of the High Court 1980, O. 14, O. 14A

Sales Tax Act 1972, s. 26

Service Tax Act 1975, s. 17

For the applicant/plaintiff - Shahinuddin Shariff; M/s Shahinuddin & Ranjit
For the respondents/defendants - Sivasankar Chelliah; M/s Sankar & Co

Reported by Amutha Suppayah

JUDGMENT

Lee Swee Seng JC:

Prologue

[1] Parliament, in its wisdom and wielding its vast powers, has made directors of companies to be jointly and severally liable for the contributions due and payable to the Employees' Provident Fund under the Employees Provident Fund Act 1991 (EPF Act) for the period they were directors of the companies, during such period in which contributions were liable to be paid by the companies. Such is the broad ambit of s. 46(1) of the EPF Act. 'Contributions' under s. 46(2) of the Act shall be deemed to include any dividend and interest due on any contributions.

[2] Whilst directors are generally separate entities from the companies and their shareholders, yet Parliament in exercising its paternalistic powers, has made directors to be personally and jointly and severally liable. Such a provision like s. 46(1) of the EPF Act is also found in varying forms in various statutes such as in s. 22C of the Customs Act 1967, s. 108A of the Employees' Social Security Act 1969, s. 26 of the Sales Tax Act 1972 and s. 17 of the Service Tax Act 1975; to name but a few. Perhaps the underlying commonality is that in most of these cases the payments, collections or deductions have already been made and it is for the companies to forward the amounts to the authorities or body concerned. Hence the law looks to the directors personally where liability is concerned.

[3] This action by the plaintiff against the directors of the George Town Chemist Sdn Bhd (company) brings into focus the validity of such a provision and other issues in the context of a summary judgment application for unpaid contributions under the EPF Act.

[4] All the 1st to the 6th defendants were directors of the company during the relevant period.

Problem

[5] The company went into financial problems and on 9 March 2005, obtained a restraining order under s. 176(10) of the Companies Act 1965 to restrain legal action against it for a temporary period pending the approval of a scheme of rearrangement under s. 176(1) of the Companies Act.

[6] The company who is the employer within the meaning of the EPF Act failed to make contributions to the tune of RM270,127 for the period from August 2004 to March 2005.

Prayer

[7] By way of encl. 35, the plaintiff claimed under an O. 14 Rules of the High Court 1980 (RHC) application for the following:

i) Judgment be entered against the 1st defendant and the 2nd defendant for the sum of RM270,127, being the EPF contribution for the period from August 2004 to March 2005;

ii) Judgment be entered against the 3rd defendant and the 4th defendant for the sum of RM148,249, being the EPF contribution for the period from August 2004 to November 2004;

iii) Judgment be entered against the 5th defendant for the sum of RM121,878, being the EPF contribution for the period from December 2004 to March 2005;

iv) Judgment be entered against the 6th defendant for the sum of RM93,156 being the EPF contribution for the period from December 2004 to February 2005;

v) Dividends on the EPF contribution due for the period from August 2004 to March 2005 at the rate of 4.750% per annum for 2004 and the dividends for the subsequent years at the rate declared by the plaintiff for each year calculated from 22 December 2004 until full settlement;

vi) Interest on the EPF contribution for the period from August 2004 to March 2005 at the rate of 5.500% per annum for the period from 22 August 2004 to 17 February 2005; at the rate of 5.750% per annum for the period from 18 February 2005 to 21 March 2005 and interest for subsequent periods as may be declared by the plaintiff for each year calculated from 22 August 2004 until full settlement;

vii) Costs.

Principles

[8] In an O. 14 RHC application the correct approach to follow is as set out by his Lordship, Mohd. Azmi SCJ in *Bank Negara Malaysia v. Mohd. Ismail Ali Johor & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 at p. 19:

> Under an O. 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion

A judicially in an O. 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

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[9] I am also conscious of the procedure to be followed in an O. 14 RHC application as succinctly summarised in *Cempaka Finance Bhd v. Ho Lai Ying & Anor* [2006] 3 CLJ 544, at pp. 551-552 by his Lordship Steve Shim CJ (Sabah & Sarawak) C who when speaking for the Federal Court said:

> We think it appropriate to remind ourselves once again that in every application under an O. 14, the first considerations are (a) whether the case comes within the order and (b) whether the plaintiff has satisfied the preliminary requirements for proceeding D under O. 14. For the purposes of an application under O. 14, the preliminary requirements are:
>
> i) the defendant must have entered an appearance
>
> ii) the statement of claim must have been served on the E defendant; and
>
> iii) the affidavit in support of the application must comply with the requirements of r. 2 of the O. 14.
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> F … If the plaintiff fails to satisfy either of these considerations, the summons may be dismissed. If however, these considerations are satisfied, the plaintiff will have established a *prima facie* case and he becomes entitled to judgment. This burden then shifts to the defendant to satisfy the court why judgment should not be given against him.

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[10] With that in mind, I shall proceed to consider each of the so-called triable issue raised by the defendant.

That The Restraining Order Under s. 176(10) Companies Act 1965 Effectively Restrains The Plaintiff From Proceeding H Against The Directors Of The Company

[11] Counsel for the defendants, Mr Sivasankar Chelliah, argued that as the company was under a restraining order under s. 176(10) Companies Act 1965, no action can be proceeded with I against the company. As the company cannot be sued during the period when the restraining order was in force, so too the directors of the company.

[12] The matter can be resolved by asking whether the restraining order issued covered action against directors as well. Nowhere in the restraining order is the word 'directors' referred to. Indeed s. 176(10F) of the Companies Act 1965 provides:

> An order made by the Court under subsection (10) shall not have the effect of restraining further proceedings in any action or proceeding against any person other than the company that had applied for the restraining order.

[13] I agree with the plaintiff's counsel, Encik Shahinuddin bin Shariff, that an action against the directors of the company cannot in any way be interfering with the restructuring of the company and more so when the restraining order made no reference to proceeding against the directors of the company. In all the technicalities, it must not be forgotten that the deductions from the employees' salaries had been made by the company and yet the amounts deducted had not been forwarded to the fund.

[14] The reliance by the defendants' counsel on the *dicta* of his Lordship Peh Swee Chin SCJ in *Puah Bee Hong @ Bee Hong (F) & Anor v. Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor* [1994] 2 CLJ 705 at p 713 is thus misplaced:

> We are of the considered view that an order of a superior Court such as High Court, even if it is eg, and order obtained *ex-parte* or a default judgment, until it is set aside, must be obeyed by everyone whether its validity is challenged or not, and "it is the plain and unqualified obligation of every person against, or in respect of whom an order is made by a Court of competent jurisdiction to obey it unless and until the order is discharged", per Romer, LJ in *Hadkinson v. Hadkinson* [1952] 2 All ER 567. This passage was quoted with approval and adopted by this Court in *Pembinaan KSY Sdn Bhd v. Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 100. It was stated in *Issacs v. Robertson* [1984] 3 All ER 140 that it was misleading to describe such an order of competent jurisdiction as void or voidable, for every order must be obeyed until it was set aside and "these are not orders which are void *ipso facto* without the need for proceedings to set them aside". One of the reasons is that such a superior Court must be presumed to have the jurisdiction to make an order which it had made. Every order made by a superior Court must be regarded as an order of competent jurisdiction.

A Further a superior Court, like the High Court, is considered to be a Court of unlimited jurisdiction in contentious civil matters and is therefore to be distinguished from those inferior tribunals which are established outside the hierarchy of ordinary Courts.

B **That The Officer Concerned Was Not Duly Authorised To Certify The Amount Outstanding And To Commence This Action**

[15] Section 14 of the EPF Act provides as follows:

C Powers and duties of the Board.

(1) The Board shall have such powers and shall perform such duties as are given or imposed by this Act.

(2) The Board may, by instrument under its seal, appoint any
D person and delegate to such person whether in Malaysia or any place outside Malaysia all or any of such powers and duties of the Board and the person so appointed may, subject to the instrument, do any act or exercise any power or carry out any duty which he is authorized by the instrument to do or execute.

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(3) The Board may employ and pay agents, advocates and solicitors, bankers, stockbrokers or any other persons, to transact any business or do any act required to be transacted or done in the exercise of its powers or in the carrying out of its duties or for the better carrying into effect of the
F purposes of this Act

[16] The deponent of the affidavit in support of the plaintiff, one Nailatul Himam binti Mohd Latfie, had stated that she is a senior legal officer of the plaintiff and is duly authorised to affirm the
G affidavit on behalf of the plaintiff. She had also exhibited *vide* exh. NH1 a copy of the 'Instrument of Delegation of Powers' duly signed by the Chairman and a Board member dated 23 December 2004 setting out the powers delegated and the category of officers to whom it is delegated. In the absence of evidence to the
H contrary, a mere assertion that the said Nailatul had not been duly authorised to affirm the said affidavit and to sign the certificate referred to in s. 64 of the EPF Act, would not be sufficient to displace the authority of the said deponent of the plaintiff.

I

[17] Section 64 of the EPF Act provides that in any legal proceedings a copy of an entry in the accounts of the fund duly certified under the hand of an authorised officer of the Board shall be *prima facie* evidence of such entry having been made and of the truth of the contents thereof.

[18] Section 65(1) of the EPF Act reads:

> Notwithstanding the provisions of any other written law all contributions payable under this Act may, without prejudice to any other remedy, be recoverable by the Board summarily as a civil debt.

[19] Section 65(2) of the EPF Act states that:

> Proceedings for the summary recovery as civil debts of contributions may be instituted by any officer authorised in that behalf by special or general directions of the Chairman and any such officer may conduct such proceedings.

[20] Whilst the EPF Act does provide for their duly authorised officer to institute proceedings, here the proceeding is instituted through a firm of solicitors as envisaged in s. 14(3) and with an advocate and solicitor appearing on the plaintiff's behalf in court. If at all, the authority of either the officer or the solicitor acting on behalf of the plaintiff is to be challenged, there must be some cogent evidence from the defendants showing otherwise.

[21] The defendants' counsel had referred the court's attention to the Court of Appeal case of *Ng Hee Thoong & Anor v. Public Bank Berhad* [1995] 1 CLJ 609 where at p. 614, his Lordship Gopal Sri Ram JCA propounded the following principle:

> Now, it is a well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict is **usually** treated as an admission by him of the fact so asserted: *Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382; *Overseas Investment Pte Ltd v. O'Brien* [1988] 3 MLJ 332. (emphasis added)

[22] It must be noted that the word used is 'usually' and not 'always' and rightly so. In the context of evaluation of affidavit evidence, it goes without saying that the positive assertion must be a positive assertion with cogent evidence and not a pure contradiction with nothing concrete to substantiate. If it is the

latter, the court may not be minded to find that the averment of a plaintiff has been displaced and disproved by a mere positive assertion of a defendant.

[23] Here I would say that in the light of the instrument of delegation of powers and the conferment of authority on the officer to act on behalf of the plaintiff and to affirm the affidavit concerned and the authority of the plaintiff's solicitors to act for the plaintiff, I find that a mere positive assertion to the contrary is insufficient to displace and to disprove the officer's authority to act on behalf of the plaintiff and to sign the relevant certificate under s. 64 of the EPF Act.

[24] I find that the defendants have not raised a *bona fide* triable issue on the above matter.

Liability Of The Directors Jointly And Severally

[25] The defendants' counsel submitted that Parliament has no authority to provide in effect through s. 46 of the EPF Act a lifting of the corporate veil and making the directors personally liable for the debts of the company.

[26] Section 46 of the EPF Act is worded in the form of a non obstante clause prefaced with the words 'Notwithstanding anything to the contrary in this Act or any other written law'. Section 46(1) reads:

> Where any contributions remaining unpaid by a company, ... then, **notwithstanding anything to the contrary in this Act or any other written law,** the directors of such company including any persons who were directors of such company during such period in which contributions were liable to be paid ... shall together with the company, ... be jointly and severally liable for the contributions due and payable to the Fund. (emphasis added)

[27] In *Ong Kim Chuan & Anor v. Lembaga Kumpulan Wang Simpanan Pekerja* [2009] 6 CLJ 586 at p. 592 the Court of Appeal speaking through Ramly Ali JCA said:

> Under s. 46, it is crystal clear that directors of a company (including persons or former directors who were directors during such periods in which contributions were liable to be paid to the EPF) shall together with the company be jointly and severally liable for the contributions due and payable to the fund. These provisions are to be enforceable 'notwithstanding anything to the contrary in any other written law.'

[28] In the case of *Lembaga Kumpulan Wang Simpanan Pekerja v. Shaharudin Omar & Ors* [2008] 8 CLJ 684 Hishamudin Yunus J (as he then was) states at p. 688:

> In the first place, s.46 of the Act does not create to strict liability offence. Secondly, the board of directors of a company is the alter ego of the company. Hence, it was logical legally for s. 46 to make the directors liable for any non-payment of EPF contributions by the company.

[29] It is for the Parliament to legislate in the case of a specific statute which in this case is a social piece of legislation having in mind the express purpose of providing for compulsory savings for the workers in Malaysia to help them in their retirement years, the overriding provision of making the directors personally and jointly and severally liable. It must be borne in mind that in most cases the company would already have deducted the employees' contribution to the fund and failure of the company to forward the same to the fund would *prima facie* be a criminal breach of trust.

[30] The defendants' counsel have even ventured to argue that s. 46 of the EPF Act as unconstitutional but I find no merits whatsoever in the argument. If the provision may seem harsh on directors than one must consider the harsh reality that confronts the employees when the company they worked for goes into liquidation and their contributions to the fund were not being forwarded to it and the harsher reality of being rendered jobless and the debilitating effect of being unemployed.

Pronouncement

[31] I have considered the Certificate of the amount outstanding under s. 64 of the EPF Act duly signed by the officer authorised by the plaintiff which is *prima facie* evidence of the correctness and truth of the amount outstanding to the plaintiff from the company as exhibited in exh. NH4. There is no evidence to the contrary provided by the defendants. See the case of *Tang Kwor Ham & Ors v. Lembaga Kumpulan Wang Simpanan Pekerja* [2005] 8 CLJ 676.

[32] I have also considered the evidence in Borang E exhibited in exh. NH3 showing the contributions due from the company and the employees for the relevant period.

[33] I have also satisfied myself as to the period the defendants were directors of the company from the Form 49 filed with the Registrar of Companies under the Companies Act 1965 as exhibited in exh. NH7.

[34] I am satisfied that the various notices of demand had been served on the defendants as exhibited in exh. NH8.

[35] The requirements for the payments of dividends and interests are found in s. 45(3) and 49 of the EPF Act respectively.

[36] I had therefore allowed judgment to be entered for prayers i) to vii) and with costs. Interest after March 2009 shall be capped at 5.65% per annum because interest rate declared as exhibited in NH6 from 5 March 2009 is at 5.65%.

Postscript

[37] Seeing the onerous responsibility laid upon the directors of the companies and the corresponding liability for non-payment of EPF contributions of the employees and the company, it behoves them to ensure that at board meetings, they have obtained written confirmation from the executive director and have it duly minuted that all statutory payments have been made. Failure to do so may expose all the directors, jointly and severally liable, they may be, irrespective of their involvement and interest in the company, to the full brunt of the law.